IN THE
SUPREME COURT OF MISSOURI

No. SC92663

PF GOLF, LLC,

RESPONDENT,

v.

DIRECTOR OF REVENUE,

APPELLANT.

BRIEF OF RESPONDENT

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STATEMENT OF FACTS

Respondent PF Golf is dissatisfied with the accuracy and completeness of the Director's Statement of Facts and accordingly files this Statement of Facts. Rule 84.04(f).

The evidence submitted at trial consists of the following facts. At least 12 times in the Commission's Findings of Fact it referred to the sales transactions at issue as "cart rental(s)." L.F. 85-9.

During all relevant periods, Pevely owned and, through Walters Golf Management, operated the Golf Club at Pevely Farms, which consists of a championship 18-hole golf course in the Meramec River Valley in St. Louis County. Pevely's facilities also include a clubhouse with dining facilities, and practice facilities, including a practice putting green and a driving range. All of these facilities are open to the public. Tr. 21-23 (A-96 – 98).

Pevely offers to the public daily play of the golf course and also offers annual passes. Tr. 33-35 (A106 – 108). For daily play, golfers pay to play the golf course one time. Each additional time that the course is played, the golfer must pay an additional fee. The daily play fee fluctuates depending on the season, the day of the week, the weather and the demand for play. Tr. 33-35 (A106 – 108). Golfers also have the option of obtaining an annual pass. An annual pass entitles its holder to play any time during the year without additional charge. Tr. 33-35 (A106 – 108).

Pevely's golf course is very difficult to walk. Because the distances from the golf greens to the next tee are so long (the distance alone from the first green to the second tee is 550 yards), and because the course is hilly, in an effort to enhance the enjoyment of the golfing experience, Pevely encourages golfers to rent carts to carry them and their clubs during a round of golf. The course itself is over 7,000 yards long. Tr. 31 (A-104), Ex. 3 (A-143 - 145). In addition, the distances from greens to the following tees is over 3,200 yards. Ex. 4 (A-146). The vast majority of golfers at Pevely want to take carts. Of the over 20,000 rounds that had been played in 2011 (as of August 25, 2011, the date of hearing), very few people (four) requested to walk Pevely. Tr. 30-32 (A-103 – 105), 56 (A-122).

The golf carts transport the golfers and their clubs and other belongings. Each cart offers a GPS-enabled system that serves to provide the same information to the golfer that would be provided by a caddie: distances to the center of a green, distances to hazards (like water or sand bunkers), and distances to other points of interest on the course. The GPS system also communicates with the pro shop such that each cart can be identified on a map of the golf course. This comes in handy if someone on a cart seeks assistance from the pro shop. Tr. 24-27 (A-99 – 102).

A patron renting a cart has the use of the cart for the patron's round of golf, must agree not to damage the cart, must keep the cart on Pevely's property, and must return the cart at the conclusion of the round of golf. Tr. 35-6 (A-108 – 109).

The rental of Pevely's golf carts and their terms of rental are similar to other golf courses' terms, including those at Westwood Country Club. Tr. 36-7 (A-109 – 110).

During the relevant tax periods, for daily fee play, the charge for golf cart rental was $22.50 per round, regardless of the time of year. For annual pass-holders during the relevant tax periods, the charge for the cart rental was 50 percent of the charge for the annual pass. That allocation was determined as follows: Pevely recorded the average number of rounds each year that annual pass-holders played golf with a cart, multiplied that average number of rounds per year by $22.50 per round for the cart, and compared the resultant product to the annual fee. The cart rental component of the annual fee worked out to approximately 50 percent of the fee. Tr. 50 (A-116), Exs. 5-6 (A-147 – 149).

Occasionally non-golfers seek to accompany golfers during their play, for instance, when a mother seeks to watch her son or daughter play golf. In such cases, those non-golfers who wished to do so would pay only the cart rental fee. Tr. 42-3 (A-113 – 114).

Walters Golf Management operates numerous other public courses in the St. Louis area. Many of those courses have shorter distances from greens to tees, so that walking the course is not discouraged and many more golfers elect to walk. Cart rental at all of those courses that were of comparable quality to Pevely was also $22.50 per round during the relevant tax periods. Tr. 49-50 (A-115 – 116).

Certain annual fee "members" of courses other than Pevely had reciprocity for use of Pevely's facilities. That meant that those "members" could play golf at Pevely and pay no golf greens fee. They did pay for their cart rental, which was the only charge they would incur for golf. Tr. 35 (A-108).

For the convenience of its customers, Pevely priced its daily and annual golf fees and cart rentals together. However, all of Pevely's patrons' receipts (both daily play and annual play) separately itemized the charge for the greens fee from the cart rental. Sales tax was collected from the patron, and remitted to the Director, on the greens fee component of the charge. Because Pevely paid tax upon its acquisition of the carts (and GPS devices mounted on the carts), it collected and remitted no sales tax on the cart rental charges. Tr. 37-39 (A-110-112).

Pevely sometimes advertised a combined price for greens fee and cart rental and indicated that patrons could walk the course but would still have to pay the cart rental fee. However, in practice it did not charge the cart rental fee to patrons who were required to walk by the rules of competition (such as high school, college, or professional competitions) or to patrons who, while present in the clubhouse, requested to walk and avoid the cart rental fee. Tr. 56-8, 133-5, 139 (A-122 - 124, A-138 - 140, A-142). According to Pevely's head golf professional at the time (he is now an insurance agent), Pevely did not in practice have mandatory cart rental fees. Tr. 120, 137 (A-136, A-141).

Pevely also advertised certain reduced rates for playing golf on the condition that patrons printed out and presented e-mailed coupons for the reduced rate. However, in

practice Pevely did not actually require its patrons to present such coupons so long as the patron knew of the coupons and asked for the coupon rate without presenting the coupon. Tr. 130 (A-137).

The Director's assessments at issue are based upon the Director's position that a "mandatory" golf cart rental is taxable even if the vendor has already paid tax at the time it acquired the carts subsequently rented. Ex. C. Pevely's managers did not know, until after the tax periods at issue in this appeal, that the Director thought Pevely's cart rentals were "mandatory" or that, in the Director's opinion, "mandatory" cart rentals were taxed differently than any other cart rentals. Tr. 55-6 (A-121 – 122).

Pevely paid sales tax upon its acquisition of the golf carts, either by outright purchase of them, or when it acquired the carts by lease. Tr. 102 (A-133). Relying on the Supreme Court decision in *Westwood Country Club v. Director of Revenue*, 6 S.W.3d 885 (Mo. banc 1999), section 144.020.1(8), Regulation 12 CSR 10-108.700, the fact that it pays sales tax upon its acquisition of the carts, and advice of its accountants and lawyers, Pevely did not collect from its customers nor remit to the Director any tax on its subsequent rental of the golf carts to its customers. Tr. 51-6 (A-117 – 122).

The Director issued the subject assessments of tax and interest solely on Pevely's rental of the golf carts. Of the tax assessed herein, approximately 87.5 percent is for rental of golf carts to customers paying a daily fee and approximately 12.5 percent is for rental of golf carts to customers paying annual fees ($249,886.46/($249,886.46 + $1,757,124.76)). Ex. C, page V. (A-172), Tr. 105-106 (A-134 – 135).

The Director did not publish her position that mandatory cart rentals were taxable in any tax policy notice or regulation prior to or during the tax periods. Tr. 65 (A-125), Ex. 11 (A-154). Her regulation 12 CSR 10-108.700, in effect now and during the Tax Periods, provides that "the subsequent lease of tangible personal property is not taxable" if the "lessor pays tax on the purchase price." The regulation makes no mention of a distinction for any mandatory rentals.

In 2007, the Director issued a proposal to amend her regulation to treat mandatory rentals differently, but the Director withdrew that proposed regulation without publishing it. Pevely's management did not know about that proposal, but had they known, they would have assumed that the Director withdrew it because the proposed amendment was unlawful. Tr. 65-7 (A-125 – 127), Ex. C, p. E-6 (A-171).

The Director issued Letter Ruling LR 1349 on February 3, 2003. The Director summarized the facts at issue in this letter ruling as follows:

> Applicant leases golf carts from Lessor, a Corporation located in another state. The lease is for 48 months and ends in March 2006. The Lessor is currently charging Applicant use tax on the lease of the golf carts. However, Applicant has collected sales tax from its patrons at the time of the subsequent rental of the golf carts and not paid any use tax to the Lessor.

The Director stated Applicant's issue as "[m]ust Applicant pay use tax on lease payments made to the Lessor for the lease of golf carts?"

The Director responded as follows:

> Applicant is not required to pay use tax on the lease payments made to the Lessor for the lease of the golf carts if Applicant collects tax on its rental of the golf carts to its patrons.
>
> Section 144.020.1(8), RSMo, imposes a sales tax on the rental or lease of tangible personal property. Under the provisions of this section, the lessor or renter of the tangible personal property has the option to pay tax at the time of the rental or lease or to collect tax on his subsequent rental or lease of the property. … Applicant has, in effect, elected to not pay tax on its original lease; instead, Applicant has elected to collect tax on the subsequent rentals.
>
> … However, Missouri sales tax laws allow Applicant to choose whether to pay tax on its purchase or to collect and remit tax on its receipts. …

Ex. 12 (A-155).

The word "mandatory" does not appear in Letter Ruling LR 1349; nor does this letter ruling include any discussion of whether Applicant's subsequent rentals are "mandatory" or optional. Ex. 12 (A-155).

The Director issued Letter Ruling LR 5821 on August 7, 2009, after the last tax period at issue in this case. There, the Director summarized the taxpayer's facts as:

> Applicant is a member of a private country club. Members of the country club pay a fee for use of the club facilities. For a separate "trail fee," the

> country club allows Applicant to use his own private golf cart on the golf course cart paths. Applicant paid sales tax on the purchase price of his private golf cart.

The Director stated Applicant's issue as "[a]re the fees paid by Applicant to the country club for using Applicant's own golf cart subject to sales tax?"

The Director responded as follows:

> Yes. The fees paid by Applicant to use his own golf cart on the country club golf course are subject to sales tax.
>
> ***
>
> Fees charged by a private country club to members for the rental of golf carts are subject to sales tax unless the country club paid sales tax at the time it purchased the golf carts under Section 144.020.1(8), RSMo. *Westwood Country Club v. Director of Revenue*, 6 S.W.3d 885 (Mo. banc 1999). The fact that Applicant paid sales tax at the time he purchased his private golf cart is not relevant since Applicant does not lease his golf cart to another person. The fees charged Applicant for using his own golf cart on the country club golf course are recreational fees subject to the sales tax.

Ex. 13 (A-156 - 157).

The word "mandatory" does not appear in Letter Ruling LR 5821; nor does this letter ruling include any discussion of whether Applicant's subsequent rentals are "mandatory" or optional. Ex. 13 (A-156 - 157).

On August 12, 2011, the Director sent an e-mail to interested parties. In that e-mail, the Director provided a link to a "proposed rule" that would amend regulation 12 CSR 10-108.100 relating to places of Amusement, Entertainment and Recreation. Nothing in that e-mail purports to amend 12 CSR 10-108.700. In the contemplated proposed amendment, the Director proposes to treat "mandatory" cart rentals differently from optional cart rentals. Ex. 14, Example (4)(B) and (4)(C) (A-162). This Court can take judicial notice that the proposed regulation 12 CSR 10-108.100 was not in fact adopted.

On June 25, 2009, Wayne Rosenthal, the senior auditor conducting the subject audit of Pevely inquired by e-mail of the Director's audit managers whether they agreed with him to collect sales tax on "mandatory golf cart rentals" even if the vendor had already paid sales tax at the time it acquired the carts. Jane Gardner, Manager of the Springfield Field Compliance Office, responded with surprise at the change of policy:

> Oh gee. We have audited three country clubs rather recently but have none currently open.
>
> Because **all three of these country clubs pay tax on their purchase of the carts**, the auditor did not consider any of the golf cart rents subject to tax (the rents are tracked in [a] separate revenue account). The auditor did not ask whether golf carts are mandatory with the round of golf.
>
> This morning we called these three audits. Two of them do not ever have mandatory golf cart rentals. One of them has mandatory golf cart rentals

on the weekends only and they record the golf cart rental in [a] golf cart rental revenue account (instead of recording it in the greens fee revenue account) and do not tax these rents.

If the department does think the mandatory cart rental is taxable with the round of golf (I think there's a reasonable argument that it is indeed taxable), then [it] looks like my golf course is going to get prospective treatment because we missed it in the audit.

Exs. 10 (A-152 - 153) and L (A-173) (emphasis original).

STANDARD OF REVIEW

The decision of the Commission shall be upheld unless: (1) it is not authorized by law; (2) it is not supported by competent and substantial evidence upon the whole record; (3) a mandatory procedural safeguard is violated; or (4) it is clearly contrary to the Legislature's reasonable expectations. Section 621.193; *Concord Publishing House, Inc. v. Director of Revenue*, 916 S.W.2d 186 (Mo. banc 1996).

This Court's interpretation of Missouri's revenue laws is *de novo*. *Zip Mail Services, Inc. v. Director of Revenue*, 16 S.W.3d 588, 590 (Mo. banc 2000). Because section 144.020 is a tax imposition statute, it is the Director's burden to show the tax liability at issue, and section 144.020 "shall be strictly construed against the taxing authority in favor of the taxpayer." *Six Flags Theme Parks, Inc. v. Director of Revenue*, 102 S.W.3d 526, 529 (Mo. banc 2003).

ARGUMENT

I.

Section 144.020.1(8) Prohibits PF Golf From Charging Sales Tax on the Rental or Lease of Golf Carts in That, Under Section 144.020.1(8), Golf Carts Are Tangible Personal Property and PF Golf Paid Sales Tax on Its Acquisition of The Carts.

A. Introduction (and Response to Director's Subpart A)

In the immortal words of baseball legend Yogi Berra "[i]t's déjà vu all over again." This appeal presents the same issue that this Court has already resolved in the taxpayers' favor three times: (1) in *Westwood Country Club v. Director of Revenue*, 6 S.W.3d 885 (Mo. banc 1999) (section 144.020.1(8) forbids taxation of golf cart rental where tax was paid by the lessor when it acquired the carts); (2) in *Six Flags Theme Parks, Inc. v. Director of Revenue ("Six Flags I")*, 102 S.W.3d 526 (Mo. banc 2003) (section 144.020.1(8) forbids the taxation of video game rentals where tax was paid by the lessor when it acquired the video games); and (3) in *Six Flags Theme Parks, Inc. v. Director of Revenue ("Six Flags II")*, 179 S.W.3d 266 (Mo. banc 2005) (section 144.020.1(8) forbids the taxation of inner tube rentals where tax was paid by the lessor when it acquired the inner tubes).

Section 144.020.1(8) imposes:

> [a] tax equivalent to four percent of the amount paid or charged for rental or lease of tangible personal property, provided that if the lessor or renter of any tangible personal property had previously purchased the property under

> the conditions of "sale at retail" or leased or rented the property and the tax was paid at the time of purchase, lease or rental, the lessor, sublessor, renter or subrenter **shall not apply or collect the tax on the subsequent lease**, sublease, rental or subrental receipts from that property.

Emphasis added. In each of the three cases above, the Director argued (as he does in subpart A here) that because the rental charge was made in a place of amusement, the rental charge was taxable under section 144.020.1(2). In each such case, this Court rejected that argument because section 144.020.1(8) is the more specific provision "in that it expressly deals with the lease or rental of personal property upon which sales tax has already been paid." *Westwood*, *supra*, 6 S.W.3d at 889; *Six Flags I*, *supra*, 102 S.W.3d at 529-30, *Six Flags II*, *supra*, 179 S.W.3d at 268.

Section 621.193 instructs that this Court should avoid a result that is contrary to the reasonable expectations of the Missouri General Assembly. The Missouri General Assembly has twice amended section 144.020 since this Court decided *Westwood Country Club*, once in 2001 and once in 2011. *See* A.L. 2001 H.B. 933 and A.L. 2011 S.B. 356. Also, the later amendment was made after this Court issued both of the *Six Flags* decisions. In neither case did the General Assembly see fit to amend section 144.020.1(8) to undo this Court's decisions. The General Assembly is thus presumed to accept this Court's decisions on this issue. *See State ex rel. Howard Electric Cooperative v. Riney*, 490 S.W.2d 1 (Mo. 1973) ("In the circumstances here presented, the General Assembly must be presumed to have accepted the judicial and administrative

construction[.]"). *See also William A. Straub, Inc, v. City of St. Louis,* 506 S.W.2d 377, 380 (Mo. 1974); *Jacoby v. Missouri Valley Drainage Dist. of Holt County*, 163 S.W.2d 930, 939 (Mo. 1942); *cf. Medicine Shoppe International, Inc. v. Director of Revenue*, 156 S.W.3d 333, 334 (Mo. banc 2005). Changing the rules of the game now would clearly run afoul of the reasonable expectations of the Missouri General Assembly.

Also, as this Court has repeatedly concluded, "[t]he purpose of Missouri's sales tax system is to tax property once and not at various stages in the stream of commerce[.]" *Six Flags I,* 102 S.W.3d at 530. Here, it is undisputed that the Director seeks double taxation, first on PF Golf's acquisition of the carts and again on its subsequent rental of them to its patrons. The Court recognized in *Westwood, Six Flags I,* and *Six Flags II,* that where an owner pays tax when it purchases personal property, "the goal of taxing the property only once is met by not taxing the subsequent rental to customers." *Id., citing Westwood,* 6 S.W.3d at 889; *see also, Six Flags II,* 179 S.W.3d at 268 (noting that avoiding double taxation was "a separate, but equally compelling rational" for the Court's holding that rental payments were not taxable).

There is no question that golf carts are tangible personal property and that PF Golf paid tax on its acquisition of them. The law thus forbids PF Golf from collecting tax from its customers on the "subsequent rental or lease" of the carts.

Subpart A of the Director's argument merely notes what has never been in dispute, namely, that the Pevely golf course is a place of amusement (and, like any golf course, sometimes a source of incredible frustration). But that fact is irrelevant here, as

demonstrated by the holdings in *Westwood, Six Flags I and Six Flags II*. These three cases directly addressed and rejected the Director's arguments that section 144.020.1(8)'s prohibition notwithstanding, section 144.020.1(2) imposes a tax on rentals in a place of amusement.

Before the Commission, the Director argued that a "mandatory rental charge" was taxable because the customer could not avoid it. L.F. 92. The Commission rejected that argument because neither this Court, section 144.020.1(8), the Director's regulation, nor the Director's letter rulings, distinguish between "mandatory rentals" and "non-mandatory rentals" since both are "rentals." LF. 93-4. Moreover, the assertion that the customer could not avoid the rental charge is contrary to the record in this case.

In subpart B of his brief, the Director has apparently changed his argument somewhat from the argument presented to the Commission. Apparently conceding that a mandatory cart rental is still a cart rental under section 144.020.1(8), the Director now argues that PF Golf does not rent golf carts at all; it merely sells rounds of golf. Dir. Br. 13-4. That argument belies the facts of this case and should be rejected. The record in this case clearly shows that PF Golf rents golf carts to its customers. The Commission's factual finding in that regard is supported by competent and substantial evidence.

In subpart C, the Director argues that his regulation and letter rulings support his assessment. But, as demonstrated below, this argument is wholly dependent on the Director's improper spin of the facts and should be rejected on that basis. Whether PF Golf's rentals are mandatory or not, they are in fact rentals.

Last, in subpart D, the Director rehashes another argument that this Court has rejected three times, namely that the boat and outboard motor exclusion in section 144.020.1(8) evidences that rentals of anything else in a place of amusement are taxable, whether or not tax was paid when the lessor acquired the property. The Court should reject this argument again, both because it is wrong and because the General Assembly did not see fit to undo this Court's resolution of that argument even though it twice amended section 144.020 after the first of this Court's decisions on the issue.

B. PF Golf Charged A Rental Fee For Use of the Golf Carts (Responds to Director's Subpart B)

The Director challenges the Commission's factual finding that PF Golf rented golf carts, but that finding is clearly supported by competent and substantial evidence. In claiming that Pevely does not rent carts or impose a rental charge, the Director misrepresents the evidence presented to the Commission. Dir. Br. 13-4. Here, just as in *Westwood County Club*, the taxpayer granted the right to use the golf carts for money and did so under terms that are similar to the terms imposed by Westwood Country Club (may use for the round of golf, must agree not to damage the cart, must keep the cart on the golf course property, and must return the cart at the conclusion of the round). Tr. 35-7 (A-108 – 110). The customers' receipts clearly and separately showed the cart rental charges. *See* Exs. 5-8 (A-147 – 151). And while the vast majority of PF Golf's patrons sought both the greens fee and cart rental, those that sought only the greens fee or only the cart rental had their requests honored and did not pay for what they did not want (Tr.

56-8, 133-5, 139) (A-122 – 124, A-138 – 140, A-142). The one exception of record was for one person who was not a patron but who merely posed as one over the phone. Commission Finding 14, L.F. 86-7. And the Commission referred to the transactions at issue as "golf cart rentals," or similar words, twelve times in the Findings of Fact alone. L.F. 85-9. Indeed the Director states that PF Golf's "customers … rent golf carts." Dir. Br. 13.

In *Westwood*, this Court not only addressed the precise legal issue presented by this case, it did so in the context of a golf course's "subsequent rental" of golf carts. There, like here, the taxpayer paid tax when it acquired the golf carts, so this Court concluded that section 144.020.1(8) forbid it from collecting tax on its subsequent rentals of the carts. The circumstances addressed by this Court in Westwood were not "distinctly different," as the Director argues (Dir. Br. 15-6). The Director's claims are unfounded factually and legally. They are based on a misreading of the facts of this case—that the cart rentals were mandatory—and based on this misreading, the Director asserts that the rental fees therefore were part of the golf greens fees that are clearly taxable under section 144.020.1(2). But *Westwood* demonstrates that the fact that the cart rental fees were a charge or fee paid in or to a place of amusement is not dispositive. It does not matter if the cart rental fee is directly a fee in or to a place of amusement or indirectly connected to another fee that is incurred in or to a place of amusement. The question in *Westwood*, just as in this case, is whether the imposition of tax under section 144.020.1(2) is "trumped" by section 144.020.1(8) when it provides that the lessor "**shall**

not apply or collect the tax on the subsequent … rental." (Emphasis added). Even if PF Golf's rentals are mandatory, they are still rentals and section 144.020.1(8) and the holding in *Westwood* apply.

While the Director believes that a case addressing the exact statutory provision at issue in the context of golf cart rentals does not apply, he thinks that a case involving a different statutory provision and the delivery expense for concrete does apply. Dir. Br. 16-7. The Director relies on *Southern Red-E-Mix Co. v. Director of Revenue*, 894 S.W.2d 164 (Mo. banc 1995), a case that is clearly inapposite. There, the question was whether a concrete vendor imposed a separate nontaxable delivery charge in connection with its taxable sales of concrete. The sale of concrete is taxable because it is tangible personal property. Section 144.020.1(1). A delivery charge is a nontaxable service. This Court concluded that whether a delivery charge is part of a taxable sale of tangible personal property depended on a number of factors and found that because there was no separately stated charge for delivery, and the seller bore the risk of loss during shipment, as well as other factors, the cost of delivery was simply part of the "gross receipts" for the sale of concrete. *Id*., 894 S.W.2d at 167. The decision did not address any of the issues in this appeal. Certainly, it did not address any issue involving golf carts, rentals, or the application of a statute that expressly forbids taxation (such as section 144.020.1(8) does for "subsequent rentals").

As noted above, the Director has misrepresented the key facts of this case and the evidence presented to the Commission in his contention that PF Golf imposes no rental

charges. PF Golf would like to set the record straight with regard to the Director's repeated, unsupported, and erroneous assertions of fact.

The Director repeatedly claims that PF Golf's assertion that it rents golf carts is a "sham" intended to avoid payment of tax. Dir. Br. 8, 14, and 15. But it is undisputed that PF Golf paid tax on its acquisition of the carts. Tr. 55 (A-121); Commission Finding 7, L.F. 85. The question here is solely whether, in spite of section 144.020.1(8)'s prohibition against collecting the tax from its customers, PF Golf is required to collect tax from its customers on the subsequent rental charges. PF Golf thus had no incentive to engage in a "sham" to "avoid payment of the tax" and there is utterly no evidence to support such an accusation. Indeed, the evidence of record shows that PF Golf's management reviewed and relied upon the *Westwood Country Club* decision and the advice of its lawyers and accountants in charging its customers no sales tax on the subsequent cart rentals. Tr. 51-6 (A-117 – 122). Moreover, the evidence shows that the cart rental charge was the same whether the patron played golf, did not play golf but just rode to watch someone else play, or whether the patron played golf but did not pay a greens fee because the patron enjoyed reciprocity. Tr. 42-3 (A-113 – 114). Likewise, the evidence showed that PF Golf's charge for the cart rentals at Pevely was the same as the charge for cart rentals at other comparable courses that it operated, even though those courses were easy to walk and cart rental was not encouraged. Tr. 49-50 (A-115 – 116). The charge for the rental was thus not manipulated to assign more value to the nontaxable subsequent cart rental transaction than was warranted. In short, there is utterly no

evidence here of anything other than a vendor properly trying to collect the correct amount of tax from its customers.

Starting on page 13 of his brief, the Director also sets out bullet points of allegedly "undisputed evidence." Many of those bullet points are patently false. First, in an apparent admission that PF Golf does indeed "rent golf carts," the Director claims that PF Golf "requires its customers to rent golf carts." In fact, the evidence shows that upon request made in person, patrons were not required to rent carts or pay the associated charge. Tr. 56-8, 133-5, 139 (A-122 - 124, A-138 – 140, A-142). Likewise, the evidence showed that patrons in junior, high school, college or professional competitions did not rent golf carts or pay the associated charges. *Id*.

The next inaccuracy is the Director's second bullet point that for the four golfers who requested to and did walk in 2011 (out of 20,000 possible) they were still charged the cart rental fee. But the record shows that they were <u>not</u> charged the cart rental fee. Tr. 56-8, 133-5, 139 (A-122 - 124, A-138 – 140, A-142) ("the golf professional at that facility charged the player the green fee without the cart rental fee"); Tr. 57, 133-135 (A-123, A-138 – 140); Commission Finding 6, L.F. 85. Moreover, there were more than those four golfers who paid for no cart rental since patrons in junior, high school, college or professional competitions did not rent golf carts or pay the associated charges either. *Id*. Based upon these facts of record, it then is clear that the Director's third bullet point ("[i]t is impossible to only pay for a round of golf without a cart rental") is false. Further, the Director claims that "customers were not informed of separate greens fees and golf

cart rental fees." Dir. Br. 14. The evidence, however, shows that the receipts provided to customers showed the separate charges for cart rental and greens fee. Tr. 37-9 (A-110 – 112); Exs. 5-8 (A-147 – 151); Commission Finding 8, L.F. 85.

Last, the Director argues that "[t]he undisputed evidence is that there are not actually any golf cart rental fees charged by PF Golf." Dir. Br. 14. But the Commission's Findings of Fact refer to "golf cart rentals," or similar words, fourteen times. LF. 85-9. And the Director's assessment at issue in this appeal is on "Mandatory Cart Rentals[.]" Dir. Audit Report, Ex. C, p D-4 (A-169). Every patron's receipt actually itemized the charge that the patron paid for the cart rental. Tr. 37-9 (A-110 – 112); Commission Finding 8, L.F. 85.

Here, the Commission's decision that PF Golf rented golf carts is indeed supported by competent and substantial evidence on the record. Section 621.193.

C. The Director's Regulation and Letter Rulings Belie the Assessment (Responds to Subpart C)

As explained in detail under Point II of this brief, the Director's regulation and letter rulings do not support his assessment. Indeed, if the law is as the Director argues, they served as "head fakes" to unsuspecting vendors. As explained under Point II, the regulation and letter rulings provide that vendors have the option of paying tax when they acquire property for rental, or collecting and remitting tax on the subsequent rentals. That instruction makes perfect sense since a rental can be a retail sale if tax is not paid at the time of the property's acquisition by the lessor (section 144.020.1(8)) and section

144.010 excludes from tax purchases that are made for retail resale. Thus tax is due at one time or the other, but not at both times.

Thus, as explained in detail below, the Director's authorities made, and currently make, no distinction between "mandatory" or "optional" rentals. But twice the Director proposed to amend his regulation to actually make the optional versus mandatory distinction. While that distinction is contrary to section 144.020.1(8) and this Court's decisions, at least that amendment would have put unsuspecting vendors on notice of the Director's new policy. In neither case, however, did the Director actually adopt the amendment. Ex. C, p. E-6 (A-171), Ex. 14 (Examples (4)(B) and (4)(C)) (A-162); Judicial Notice that proposed amendment was not adopted (section 536.031.5); Tr. 65-6 (A-125 – 126). If the Director's authorities already purported to impose the sales tax on "mandatory" rentals, even when tax was already paid on the acquisition of the property by the lessor, why did the Director need to amend his regulation to so provide?

D. The Boat and Outboard Motor Exclusion is Irrelevant (Responds to Subpart D)

Here, just as he has before, the Director argues that section 144.020.1(8)'s "Boat and Outboard Motor" exclusion evidences the General Assembly's intent that section 144.020.1(8)'s general rental exclusion does not apply in a place of amusement. This Court rejected that argument most recently and explicitly in *Six Flags II:*

> The Director argues that the "Boat and Outboard Motor" exception to section 144.020.1(8) shows a legislative intent that only boats and

outboard motors be precluded from taxation under section 144.020.1(8). The Director's argument is misguided, the "Boat and Outboard Motor" exception provides that:

> In no event shall the rental or lease of boats and outboard motors be considered a sale, charge, or fee to, for or in places of amusement, entertainment or recreation nor shall any such rental or lease be subject to any tax imposed to, for, or in such places of amusement, entertainment or recreation. Rental and leased boats or outboard motors shall be taxed under the provisions of the sales tax laws as provided under such laws for motor vehicles and trailers.

This is not a situation for use of the maxim *expressio unius est exclusio* (or omissions shall be understood as exclusions), for that maxim "is to be used with great caution." *Pippins v. City of St. Louis*, 823 S.W.2d 131, 133 (Mo. App. 1992). The maxim should be invoked only when it would be natural to assume by a strong contrast that that which is omitted must have been intended for the opposite treatment. *Springfield City Water Co. v. City of Springfield*, 353 Mo. 445, 182 S.W.2d 613, 618 (1944). The "Boat and Outboard Motor" exception is merely intended to be sure that boats and outboard motors are taxed under the "laws for motor vehicles and trailers."

Section 144.020.1(8). The strong inference needed for the maxim *expressio unius est exclusio* is not present.

179 S.W.3d at 269-70. And, given that the General Assembly readopted section 144.020 after this decision favoring the taxpayer on this issue, it is assumed to have accepted this Court's conclusion on this issue as well. Thus, the reasonable expectations of the General Assembly would be for this Court to follow its prior decisions on this and the other issues. Section 621.193.

II.

Sections 32.053 and 143.903 Prohibit the Assessments at Issue in That: (1) the Director Changed His Policy Regarding the Taxation of Cart Rentals and Did So After the Tax periods at Issue and; (2) Any Decision Finding in Favor of the Assessments Would be an Unexpected Decision That a Reasonable Person Would Not Expect Based Upon Case Law, Regulations and the Director's Previous Policies, and Could Apply Prospectively Only.

Even if this Court were to construe section 144.020.1(8) and the evidence as the Director argues, this appeal presents additional bases for declaring the assessments invalid. Although those bases were clearly presented and argued to the Commission (L.F. 3-5, ¶¶ 10-14, 16(e)-(f)) the Commission did not need to reach them because it found for PF Golf based on the proper construction of section 144.020.1(8). The Director chose not to address these defenses in his brief, but that certainly does not mean that they do not apply.

A. Section 32.053 Bars the Assessment at Issue

Section 32.053 provides that:

> Any final decision of the department of revenue which is a result of a change in policy or interpretation by the department effecting a particular class of person subject to such decision shall only be applied prospectively.

The Director changed his policy on the issue before the Court in this case, and did so after the tax periods in this matter. Prior to the change in policy, the Director did not

distinguish between mandatory and optional cart rentals in determining whether sales tax applied. That fact is evidenced by the Director's regulation and letter rulings, as well as section 144.020.1(8) and this Court's decisions.

The Director did not publish her position that mandatory cart rentals were taxable in any tax policy notice or regulation prior to or during the tax periods. Tr. 65 (A-125), Ex. 11 (A-154). Her regulation 12 CSR 10-108.700, in effect now and during the relevant tax periods, provides that "the subsequent lease of tangible personal property is not taxable" if the "lessor pays tax on the purchase price." The regulation makes no mention of a distinction between mandatory and optional rentals.

In 2007, the Director issued a proposal to amend her regulation to treat mandatory rentals differently, but the Director withdrew that proposed regulation without publishing it. Pevely's management did not know about that proposal, but had they known, they would have assumed that the Director withdrew it because the proposed amendment was unlawful. Tr. 65-6 (A-125 – 126), Ex. C, p. E-6 (A-171). The Director also proposed that same amendment to her regulation shortly before the trial of this matter. *See* Ex. 14 (A-158). This Court may take judicial notice that the Director never adopted that proposal either. Section 536.031.5.

The Director's letter rulings also show that the Director made no policy distinction between mandatory and optional rentals during and after the relevant tax periods. Letter Ruling LR 1349 was issued by the Director on February 3, 2003. The facts at issue in this letter ruling were as follows:

> Applicant leases golf carts from Lessor, a Corporation located in another state. The lease is for 48 months and ends in March 2006. The Lessor is currently charging Applicant use tax on the lease of the golf carts. However, Applicant has collected sales tax from its patrons at the time of the subsequent rental of the golf carts and not paid any use tax to the Lessor.

The Director stated Applicant's issue as "[m]ust Applicant pay use tax on lease payments made to the Lessor for the lease of golf carts?" and responded as follows:

> Applicant is not required to pay use tax on the lease payments made to the Lessor for the lease of the golf carts if Applicant collects tax on its rental of the golf carts to its patrons.
>
> Section 144.020.1(8), RSMo, imposes a sales tax on the rental or lease of tangible personal property. **Under the provisions of this section, the lessor or renter of the tangible personal property has the option to pay tax at the time of the rental or lease or to collect tax on his subsequent rental or lease of the property.** … Applicant has, in effect, elected to not pay tax on its original lease; instead, Applicant has elected to collect tax on the subsequent rentals.
>
> … **However, Missouri sales tax laws allow Applicant to choose whether to pay tax on its purchase or to collect and remit tax on its receipts**. …

Ex. 12 (A-155). Emphasis added.

The word "mandatory" does not appear in Letter Ruling LR 1349; nor does it include any discussion of whether Applicant's subsequent rentals are "mandatory" or optional. Ex. 12 (A-155).

The Director issued Letter Ruling LR 5821 on August 7, 2009, after the last tax period at issue in this case. There, the Director summarized the Applicant's facts as follows:

> Applicant is a member of a private country club. Members of the country club pay a fee for use of the club facilities. For a separate "trail fee," the country club allows Applicant to use his own private golf cart on the golf course cart paths. Applicant paid sales tax on the purchase price of his private golf cart.

The Director stated Applicant's issue as "[a]re the fees paid by Applicant to the country club for using Applicant's own golf cart subject to sales tax?" and provided the following response to that question:

> Yes. The fees paid by Applicant to use his own golf cart on the country club golf course are subject to sales tax.
>
> ***
>
> **Fees charged by a private country club to members for the rental of golf carts are subject to sales tax unless the country club paid sales tax at the time it purchased the golf carts under Section 144.020.1(8),**

> **RSMo.** ***Westwood Country Club v. Director of Revenue,*** **6 S.W.3d 885 (Mo. banc 1999).** The fact that Applicant paid sales tax at the time he purchased his private golf cart is not relevant since Applicant does not lease his golf cart to another person. The fees charged Applicant for using his own golf cart on the country club golf course are recreational fees subject to the sales tax.

Ex. 13 (A-156 - 157). Emphasis added.

The word "mandatory" does not appear in Letter Ruling LR 5821; nor does this letter ruling include any discussion of whether Applicant's subsequent rentals are "mandatory" or optional. Ex. 13 (A-156 - 157).

On June 25, 2009, well after the tax periods at issue, Wayne Rosenthal, the senior auditor conducting the subject audit of PF Golf inquired by e-mail of the Director's audit managers whether they agreed with him to collect sales tax on "mandatory golf cart rentals" even if the vendor had already paid sales tax at the time it acquired the carts. Jane Gardner, Manager of the Springfield Field Compliance Office, responded with surprise at the change of policy:

> Oh gee. We have audited three country clubs rather recently but have none currently open.
>
> Because **all three of these country clubs pay tax on their purchase of the carts**, the auditor did not consider any of the golf cart rents subject to

> tax (the rents are tracked in [a] separate revenue account). The auditor did not ask whether golf carts are mandatory with the round of golf.
>
> This morning we called these three audits. Two of them do not ever have mandatory golf cart rentals. One of them has mandatory golf cart rentals **on the weekends only** [emphasis original] and they record the golf cart rental in [a] golf cart rental revenue account (instead of recording it in the greens fee revenue account) and do not tax these rents.
>
> **If the department does think the mandatory cart rental is taxable with the round of golf** [emphasis added] (I think there's a reasonable argument that it is indeed taxable), then [it] looks like my golf course is going to get prospective treatment because we missed it in the audit.

Exs. 10 (A-152 - 153) and L (A-173).

In short, the Director's regulation and letter rulings in effect both during and after the relevant tax periods merely instructed that if a vendor pays tax on its acquisition of the carts, no tax is due on the subsequent rentals. The Director's unpublished change in policy here (adding the mandatory/optional test) even caught one of his audit supervisors by surprise, meaning that the golf courses she audited were not taxed on subsequent rentals.

Section 32.053 expresses the Missouri General Assembly's understandable disdain for the tax collector misleading taxpayers with a "head fake" (particularly vendors who are collecting tax for the Director) into not collecting tax from consumers, and then

foisting huge tax assessments on those vendors, many of which, like PF Golf, have done everything they could to collect the correct amount of tax.

B. Section 143.903 Bars the Assessment at Issue

Section 143.903 provides:

> 1. Any provision of law to the contrary notwithstanding, an unexpected decision by or order of a court of competent jurisdiction or the administrative hearing commission shall only apply after the most recently ended tax period of the particular class of persons subject to such tax imposed by chapters 143 and 144 and any credit, refund or additional assessment shall be only for periods after the most recently ended tax period of such persons.
>
> 2. The provisions of this section shall apply only to final decisions by or orders of a court of competent jurisdiction or the administrative hearing commission which are rendered after October 1, 1990, and which are determined by the court or the administrative hearing commission rendering the decision, or subsequently by a lower court or the administrative hearing commission, to be unexpected. For the purposes of this section the term "unexpected" shall mean that a reasonable person would not have expected the decision or order based on prior law, previous policy or regulation of the department of revenue.

Here, there can be little question that a reasonable person would not expect any decision that would uphold the assessment at issue.

Section 144.020.1(8) (the "prior law") does not use the word "mandatory" much less exempt subsequent "mandatory" rentals from its prohibition against tax collection. *Westwood, Six Flags I and Six Flags II* (the "prior law") make no distinction between mandatory and optional subsequent rentals. Again, as shown above, the Director's "previous regulation" (and current regulation) merely provided that no tax is due on a subsequent rental if tax was paid when the vendor acquired the property. Likewise, the Director's "previous policy" as set forth in his regulation and letter rulings merely provided that no tax is due on a subsequent rental if tax was paid when the vendor acquired the property. Under these circumstances a reasonable person would not have expected any decision upholding the assessments at issue since PF Golf paid tax when it acquired the golf carts. Certainly PF Golf's accountants and attorneys did not anticipate such a decision. Tr. 51-6 (A-117 – 122).

The circumstances here are not unlike those in *Laciny Brothers, Inc. v. Director of Revenue*, 869 S.W.2d 761 (Mo. banc 1994). There, the taxpayer relied on the Director's tax forms, regulation, and representations of his auditor that so long as the invoice separately stated the labor charge in building custom equipment that charge was not subject to tax on the sale of the equipment. Unlike here, however, the subject charges in *Laciny* were taxable under the law. Nevertheless, this Court struck down the assessment of tax on the separately invoiced labor charge since the decision holding it taxable was an

unexpected decision: "[t]axpayers in general and Laciny Brothers in particular were given no clue prior to 1991 that the department of revenue had adopted a policy contrary to its regulations." *Id*., 869 S.W.2d at 764.

Under Missouri Sales Tax Law, vendors are forced to collect the sales tax for the Director. Section 144.080.4. If they collect a tax that their customers disagree is due, they could be subjected to class action lawsuits. If they collect too little tax, they could face assessments. It is patently unfair to use the legal equivalent of a head fake, namely court decisions, regulations and letter rulings, to lead vendors to do one thing and then slam them with assessments for doing exactly what that head fake suggested they should do. And recall that PF Golf even sought the advice of its lawyers and accountants and did what they instructed. In the remote event that this Court finds against PF Golf on the underlying tax liability, it should nevertheless do the right and fair thing and apply sections 32.053 and 143.903 to defeat the assessments at issue.

CONCLUSION

For all of the foregoing reasons, PF Golf's receipts for rental of golf carts qualify for the express exclusion from sales tax under § 144.020 and the Director's sales tax assessment is otherwise improper. Accordingly, this Court should affirm in all respects the decision of the Commission.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that the foregoing was electronically mailed to Jeremiah Morgan, Missouri Attorney General's Office, Supreme Court Building via jeremiah.morgan@ago.mo.gov on January 29, 2013.

I also hereby certify that the foregoing brief complies with Rule 55.03 and with the limitations in Rule 84.06(b) in that it contains 8,797 words.

/s/ Edward F. Downey